United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 74-2385

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CHARLES PERRELLA AND GERALD KATZ, CO-PARTNERS
d/b/a CHARLES PERRELLA RING COMPANY,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

MICHAEL S. WINER,
ROBERT FULTON DASHIELL,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees, by granting and withholding wage increases and granting insurance benefits either to reward employees opposed to the Union or to undermine Union support, and by threatening the loss of Christmas bonuses if the Union were successful in its organizing drive.

2. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by laying off employee Rivera, and discharging employee Rodriguez because of their Union activities.

3. Whether the Board properly issued a bargaining order as a remedy for the Company's unfair labor practices.

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) for enforcement of its order against the Perrella Ring Company (hereafter, "the Company") issued on August 26, 1974. The Board's decision and order by former Chairman Miller and Members Jenkins and Kennedy (A. 37)[1] are reported at 213 NLRB No. 1. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Manhattan, New York.

I. THE BOARD'S FINDINGS OF FACT

A. The Union obtains authorization cards from a majority of the Company's employees and demands recognition

The Company, a partnership owned by Charles Perrella and Gerald Katz, is engaged in the manufacture, assembly, sale and distribution of ring mountings for the jewelry industry (A. 4; 176, 184). On March 1,

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[1] "A." references are to the pages of the printed Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

1973,[2] employees Jose Rodriguez and Raimundo Bonilla visited the office of the Amalgamated Jewelry, Diamond and Watchcase Workers Union, Local No. 1, International Jewelry Workers Union (hereafter "the Union") located a few blocks from the Company, where they spoke with Louis Herman, the Union's Financial Secretary-Treasurer (A. 5; 47, 64, 103). Herman outlined a few of the benefits under the Union's current collective bargaining agreement, and then gave the employees several authorization cards to distribute to their fellow workers (A. 5; 104). He advised them that if the employees showed an interest, the Union would call a meeting of employees (A. 104). Before leaving, Bonilla and Rodriguez signed cards (A. 47, 65, 104, 189, 190).[3]

Between March 1 and March 5, Bonilla and Rodrigez obtained signed authorization cards from a majority of the Company's employees (A. 52-53, 66-70, 187-190). On March 5, the Union held a meeting at its office after 5:00 p.m. At that meeting, Union Financial Secretary-Treasurer Herman told the employees in attendance about improvements the Union has obtained in its contracts since 1913 (A. 104-105). He further explained that before a contract could be negotiated, the Union would first "go up to their employer and ask for recognition" and if unsuccessful, the Union "would file with the National Labor Relations Board for an election" (A. 105).

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[2] Unless otherwise indicated, all dates are in 1973.

[3] The authorization card has wording on both sides in English and Spanish. On one side it gives the Union's name and in bold print states Application for Membership and then has spaces for the name and address of the individual, company's name, occupation, date hired, wages and social security number and date of birth. There is also space for initiation fee, reinstatement fee, etc. On the reverse side under the Union's name are two paragraphs. In the first paragraph, the undersigned employee authorizes and designates the Union to negotiate and conclude agreements as to hours, wages and working conditions. In the second paragraph the undersigned employee agrees to abide by the constitution and by-law of the Union. A space is provided at the bottom of each side of the card for the employee's signature (A. 5-6; G.C. Exh. 4(c)-(g)).

By Friday, March 9, the Union had secured 16 authorization cards in a unit of 22 Company employees (A. 6; 105-106, 185). Twelve of these employees, including Bonilla and Rodriguez, were fluent in either English or Spanish, the two languages printed on the cards (A. 52-53, 66-70). Rodriguez or Bonilla made known to the four other employees, who were fluent in Greek or Iranian, the purpose of the cards (A. 52, 70).

On March 9, therefore, Union Financial Secretary-Treasurer Herman visited the Company for the purpose of requesting recognition (A. 6; 106). He advised Company owners Perrella and Katz that "[he] was there requesting recognition for their people and that they have asked [the Union] to represent them and that [he] had a substantial majority of the cards signed by their employees" (A. 6; 106, 132). Though he produced a bundle of the cards from his pocket, Herman refused Katz' request to let him examine them (A. 6, 106). Instead, Herman suggested an informal election or an NLRB election to resolve whatever doubts the Company might have as to its majority status (A. 6; 106, 432). Katz replied that an informal election would satisfy the Company, but requested information concerning the provisions of the current union contract (A. 106-107, 118, 133). Herman told Katz that he would provide the Company a copy of the Union's contract later that afternoon and then left (A. 106). Herman returned at about 3:30 p.m. with copies of the Union's 1972 contract and its hospitalization program. When Katz said he needed until Monday to study the contract, Herman advised that the Union would file a representation petition with the Board but that if the Company still preferred an informal election, he would call up the Board and cancel any scheduled Board election. The Board received the Union's election petition and cards on Monday morning, March 12 (A. 7; 71).

B. The Company embarks upon an intensive campaign calculated to undermine employee support for the Union

1. The Company interrogates the employees to find out which ones signed authorization cards, withholds promised wage increases from union supporters and grants wage increases to employees who declined to sign authorization cards.

Following Herman's first visit on Friday, March 9, Katz instructed Foreman Seegull to "sound out the employees" regarding their union sentiments (A. 166). Foreman Seegull was in charge of the shop where the employees worked (Tr. 454). Immediately after lunch, Seegull interrogated the employees as to whether they had signed union authorization cards (A. 7; 56, 70, 72, 84, 93, 249). Although some employees declined to answer, others indicated that they supported the Union (A. 72, 84, 93, 156-157). Seegull informed Katz that only a small number of employees were against the Union (A. 166).[4] About 4:30 p.m. Seegull conducted a meeting of the employees (A. 8; 157). He informed them that the Company was cancelling the wage increases for all employees previously announced in February (A. 13; 56-57, 84, 139, 143-144). He further warned them that if the Union came in, their salaries would be reduced because they would work fewer hours (A. 8; 157-158; 56, 72, 84, 92). On Monday, March 12, two employees informed Seegull that they and four others had not signed authorization cards (A. 159). Acting upon Seegull's recommendation, the Company, the next day granted wage increases to these six non-union supporters only (A. 8; 100, 204).

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[4] According to Company owner Katz' testimony, Seegull reported to him on the results of his interrogations on Friday, March 9 (A. 166-167). Seegull, however, indicated that he gave the results to Katz, on Monday (A. 161).

2. The Company lays off an admitted authorization card signer, discharges one of the two chief union organizers, and announces increased insurance benefits to its employees.

Eduardo Rivera was promoted from delivery boy to plater in the washout room and thereafter given a $10 wage increase during his four-year tenure with the Company (A. 17; 82-83, 152-153). Rivera was the son-in-law of leading union activist Rodriguez (A. 17; 81). Rivera signed a union authorization card on March 1 and, on March 5, attended a meeting at the Union's headquarters (A. 17; 83, 84). On March 9, after Union Agent Herman's recognition demand, Company Foreman Seegull asked Rivera at 1:00 p.m. whether he knew anything about the Union. Rivera answered affirmatively. About 2:00 p.m. Seegull came over and asked Rivera whether he had signed a union authorization card. Rivera answered affirmatively a second time (A. 18; 84). On March 20, Foreman Seegull informed him that he was being laid-off for lack of work (A. 18; 85, 141). No other employee was laid-off at that time (A. 18; 155). The next day, the Company transferred Rodriguez to perform Rivera's work (A. 19; 73, 155-A).

Toward the end of March, the Company directed its insurance agent, Murray Keyes, to enter the plant and inform the employees of changes the Company intended to make in their insurance coverage (A. 15; 129). The Company proposed to increase the employees' life insurance coverage from $5,000 to $10,000 and introduce a Blue-Cross-Blue-Shield health insurance plan (A. 128-130). On March 23, insurance agent Keyes, in compliance with the Company's request, advised each employee of the Company's new insurance program (A. 15; 129; 58, 91, 130).

On March 27, during a Board pre-election hearing, Union Financial Secretary-Treasurer Herman telephoned the Company office and asked to speak to leading union activist Rodriguez (A. 23; 110-111). Howard

Katz, son of one of the Company owners, phoned Foreman Seegull to summon Rodriguez, an employee with fourteen years tenure, to the office to take the phone call from the Union (A. 21-22; 126, 139-140). Herman told Rodriguez to seek permission to leave from his foreman or boss to attend the Board hearing (A. 23; 111). He gave Rodriguez directions to the Board's office, as Rodriguez had never been there before (A. 111). Rodriguez then told Foreman Seegull that the Union needed him at the hearing and showed Seegull a slip of paper on which he had jotted down the directions to the Board's office (A. 23; 75, 140). Seegull, who was in charge of the shop at all times, stated no objection to his leaving (A. 26; 146, 147-149). Rodriguez was unsuccessful in his effort to locate the Board's office; he returned to the shop about 2:00 or 2:30 that afternoon and resumed work (A. 21; 76, 140). When Katz arrived at the plant after the hearing, Seegull told him that Rodriguez "went down to the Union" (A. 149). The next day Foreman Seegull informed Rodriguez that he was being discharged on orders of the boss (A. 21; 140). Union representative Herman subsequently telephoned the Company on Rodriguez' behalf and advised Katz that he had summoned Rodriguez to the Board hearing, but the Company refused to reinstate him (A. 23-24).

3. The Company grants wage increases to all employees two weeks prior to the Board election, and delivers a captive audience speech on election day, threatening a loss in Christmas bonuses.

On April 4, the Regional Director of the Board's second region issued a Decision and Direction of Election (A. 2; 192-193). An election was ordered among the Company's employees in a unit comprised of

its 22 jewelers, polishers, lappers, washout room employees and setters.[5] On April 17, the Company granted wage increases ranging from $10 to $20 per week to all of its employees, including those who had received increases a month earlier (A. 8; 204). In late April, the Company circulated a brochure guaranteeing each employee higher wages than provided under the Union wage scale and the best possible health insurance coverage, the brochure urged employees to "Vote Perrella" (A. 14; 197, 164). On April 29, or 30, a day or two before the election, the Company's insurance agent returned to the plant where he met individually with the employees and told them that the coverage provided by the Company was better than what they could get from the Union (A. 16; 58-59). On the morning of May 1, day of the election, Katz called a meeting of the employees in which he delivered a speech advising them that he was against the Union. He warned the employees that "if there [was] sufficient union interference with [his] operation" there would not be "adequate profits to share in terms of salary increases and Christmas bonuses" (A. 27; 59, 164). Following its defeat in the election by a vote of 13 to 5, the Union filed timely objections thereto and unfair labor practice charges against the Company (A. 2-3).

II. THE BOARD'S CONCLUSION AND ORDER

On the foregoing facts, the Board concluded that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees, by withholding wage increases promised to all employees and instead giving wage increases only to those employees opposed to the Union, and

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[5] The parties agreed that 22 employees were properly included on the Excelsior list of eligible voters (A. 6).

thereafter by granting wage increases to all employees after the Board scheduled an election. The Board, former Chairman Miller dissenting, also found the Company on election day made an unlawful threat concerning the loss of Christmas bonuses in violation of Section 8(a)(1) of the Act (A. 37 n. 1). The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily laying off employee Rivera and discharging employee Rodriguez. Finally, the Board found that the Union had majority support in an appropriate unit on March 9, and that the Company's numerous and flagrant unfair labor practices warranted setting aside the election, and rendered a fair re-run election improbable.

The Board's order requires the Company to cease and desist from the unlawful conduct found. Affirmatively, the Board's order requires the Union to offer reinstatement to Rivera and Rodriguez with backpay. The Board's affirmative order further requires the Company to bargain with the Union upon request and to post appropriate notices.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING ITS EMPLOYEES, WITHHOLDING PROMISED WAGE INCREASES FROM UNION SUPPORTERS, GRANTING WAGE INCREASES AND OTHER BENEFITS, AND BY THREATENING LOSS OF CHRISTMAS BONUSES

A. Coercive interrogation

In this Court's view, interrogation, not itself threatening, is an unfair labor practice when it meets certain standards: "(1) The background, *i.e.*, is there a history of employer hostility and discrimination?

(2) The nature of the information sought, *e.g.*, did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, *i.e.*, how high was he in the Company hierarchy? (4) Place and method of interrogation, *e.g.*, was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality?" (5) Truthfulness of the reply." *Bourne v. N.L.R.B.*, 332 F.2d 47, 48 (C.A. 2, 1964). Accord: *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 137 (C.A. 2, 1968). None of these criteria is by itself controlling; nor is it necessary that all five or any particular combination of them be present in each case. *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 132 (C.A. 2, 1970); *N.L.R.B. v. Rubin*, 424 F.2d 748, 751 (C.A. 2, 1970); *N.L.R.B. v. Scoler's, Inc.*, 466 F.2d 1289, 1291 (C.A. 2, 1972).

As shown in the Statement, rather than conduct an informal election as the Company had advised the Union it would, the Company directed Foreman Seegull to "sound out" the employees. Seegull then proceeded from one employee to another, asking each one whether he had signed a union authorization card. Some of the employees intuitively regarded Seegull's questions as suspect. For Seegull received an evasive answer from an employee who had not signed a card as well as from one who had. Moreover, Rodriguez, one of the principal union organizers, challenged Seegull as he interrogated the employees by asking why he did not like the Union (A. 72). Indeed, it is likely that all the "workers quickly [got] the message of their employer's anti-union attitude given repeated questioning in such a small unit." *N.L.R.B. v. Consolidated Rendering Co.*, 386 F.2d 699, 703 (C.A. 2, 1962).

Later that day the Company made it clear to the employees that its motive for conducting the interrogation was not benign. Thus, at Katz and Perella's direction, Seegull assembled the employees in a group

shortly after he completed his interrogation and advised them that the Company was rescinding the wage increases promised prior to the Union's demand for recognition. During this same meeting, Seegull advised the employees that they would lose wages under a Union contract. Only two work days later, the Company on Seegull's recommendation reinstated the wage increases but only for the employees who had not signed cards.[6]

Viewed in this context the facts presented here fall squarely within the *Bourne* criteria. First, interrogator Seegull was unquestionably high in the Company hierarchy, for he was in charge of the shop. Secondly, Seegull's repeated questioning in this small unit prompted union organizer Rodriguez to accuse him of harboring anti-union animus and resulted in evasive answers from other employees, both of which indicate the presence of felt intimidation. Finally, Seegull's questions were not directed at measuring the level of union support generally, but rather, designed to ascertain the specific indentities of union supporters. This information was undoubtedly sought as a basis for retaliatory action against individual employees, for that is precisely the purpose to which it was put. In fact, the interrogation of the employees was a mere "prelude to the illegal [activity] which was to follow." *N.L.R.B. v. Yokell,* 387 F.2d 751, 755 (C.A. 2, 1967). Accordingly, the Board properly found that the Company's interrogation of its employees violated Section 8(a)(1) of the Act. *N.L.R.B. v. Rubin, supra,* 424 F.2d at 751; *N.L.R.B. v. Gladding Keystone Corp., supra,* 435 F.2d at 132.

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[6] Before the Board, the Company denied that Seegull was acting as its agent while engaging in this and other unlawful conduct. However, in answer to the Board's complaint, the Company admitted that Seegull was a statutory supervisor (A. 184). This alone is sufficient to hold the Company liable for his acts. See, *Irving Air Chute Co. v. N.L.R.B.,* 350 F.2d 176, 179 (C.A. 2, 1965). Moreover, the record shows that Seegull acted at the Company's direction in committing several unfair labor practice violations.

B. Withholding of wage increases, threats of economic reprisals, and granting of wage increases and other benefits

As shown in the Statement, Company Foreman Seegull convened a meeting of the employees at 4:30 p.m. on March 9, within hours of the Union's recognition demand and of Seegull's interrogation of the employees concerning their union sentiments. Seegull announced that the Company was cancelling the wage increases for all employees announced in February and also warned them that if the Union came in the employees salaries would be reduced because they would work shorter hours. The cancellation of this scheduled wage increase plainly violated Section 8(a)(1) of the Act. This announcement, made as it was shortly after many employees told Seegull of their union support and coupled with a warning that unionization meant fewer hours of work, was obviously susceptible of being understood by the employees as the being issued by the Company in response to their union organizational efforts. See *N.L.R.B. v. Hendel Mfg. Co.*, 483 F.2d 350, 352-353 (C.A. 2, 1973). Indeed, two employees made evident that they had reached this conclusion the following Monday when they informed Seegull that they and four other employees had not signed union cards (A. 159-160). For that demonstration of loyalty, the Company rewarded them by granting wage increases to these six employees alone the very next day. In these circumstances, the Board properly rejected the Company's contention that the grants were solely based on skill and ability and found instead that this grant of benefit to six loyal Company employees less than a week after the Company cancelled the general wage increase was discriminatorily designed to discourage union activity and therefore also violated Section 8(a)(1) of the Act. *N.L.R.B. v. Stratford Lithographers*, 423 F.2d 1219, 1220 (C.A. 2, 1970).

Thereafter, the Company continued its use of emoluments to undermine the Union. The Company doubled the employees' life insurance and added a health insurance plan around two weeks after the Union's March 9 demand,[7] and on April 17, midway between the Board's April 4 direction of election and election day, May 1, the Company granted wage increases to all its employees in amounts ranging from $10 to $20. The Company itself linked the emoluments and the Union by distributing to the employees shortly before the election a brochure guaranteeing employees wages higher than the Union scale and the best possible insurance coverage.[8]

It is well-settled that an employer's grant of benefits before an election to counter the union campaign interferes with the employees Section 7 rights to organize and violates Section 8(a)(1) of the Act. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405 (1964). "The danger inherent in well-timed increases in benefits is the suggestion of the fist inside a velvet glove." *Id.* at 409. In the circumstances presented here the Board's finding that the grant of insurance benefits and wage increases was for the purpose of undermining the Union and therefore violated Section 8(a)(1) is clearly proper.

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[7] While these insurance benefits may have, as Katz testified, been the culmination of discussions begun prior to the Union campaign, the Company's intention was conveniently kept secret from the employees until the Union appeared on the scene (A. 16-17). *N.L.R.B. v. West Coast Casket*, 205 F.2d 902, 905 (C.A. 9, 1953).

[8] Similarly, on April 30, the Company's insurance agent met individually with the employees and told them that the coverage provided by the Company was better than what they could obtain from the Union. Company insurance agent Keyes testified that he spoke with the employees only once in March. However, the Administrative Law Judge credited employee testimony to the contrary (A. 16). It is well recognized that credibility resolutions are matters for the trier of fact and the Board, and should not be upset on review absent extraordinary circumstances, not present here. *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965); *N.L.R.B. v. A. & S. Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

Furthermore, on May 1, just hours before the election, Company head Katz delivered a captive audience speech, during the course of which he warned the employees that "if there was sufficient union interference with his operation" there would not be "adequate profits to share in terms of salary increases and Christmas bonuses" (A. 27; 59, 164). Given the Company's prior cancellation of a scheduled wage increase followed shortly thereafter by a wage increase only to those employees opposed to the Union, its subsequent wage and insurance increase for the purpose of defeating the Union in the election, and its discriminatory treatment of Rodriguez and Rivera (discussed, *infra*), the Board was clearly warranted in concluding that "in the context of all the circumstances" (A. 37 n. 1), this statement amounted to a not too subtle hint that if the employees voted for the Union that their Christmas bonuses would be in jeopardy.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY LAID OFF EMPLOYEE RIVERA AND DISCHARGED EMPLOYEE RODRIGUEZ BECAUSE OF THEIR UNION ACTIVITY IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT

As shown *supra*, the Board found that the Company's unlawful response to the Union campaign also included the lay-off of union adherent Rivera and the discharge of Rodriguez, Rivera's father-in-law, one of the two principal union organizers, little more than a week afterwards. The question before the Court is whether substantial evidence on the record as a whole supports the Board's findings. See, *e.g.*, *N.L.R.B. v. Midtown Service Co., Inc.*, 425 F.2d 665 (C.A. 2, 1970). Under this standard of review, "even if there were ample grounds to fire [the employees] . . . if the discharges [were] even partially motivated by union activity, there is a violation of Section 8(a)(3)." *N.L.R.B. v. George J. Roberts & Sons, Inc.*, 451 F.2d 941, 945 (C.A. 2, 1971).

A. Rivera's lay-off

Employee Rivera admitted signing a union authorization card on March 9, when he was unlawfully interrogated by Supervisor Seegull. The same day, after it learned that a majority of the employees had done likewise, the Company retaliated by withholding promised wage increases from all the employees, including Rivera. On March 13, the Company discriminatorily granted the wage increases to the six employees whom it learned had not signed cards. One week after rewarding these Company supporters, the Company laid-off Rivera, an admitted union adherent and the son-in-law of one of the leading Union organizers. The numerous unfair labor practices committed by the Company, particularly the discriminatory March 13 wage increases to union resisters, amply supports the Board's finding that the Company's abrupt lay-off of this devout union stalwart occurring shortly thereafter was discriminatorily motivated. *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 138-139 (C.A. 2, 1967).

The Company defended its lay-off of Rivera before the Administrative Law Judge on the grounds that a business slowdown necessitated curtailment of its operation and that Rivera's job was so menial as to make him the logical choice for lay-off. However, the Company's purported economic justification does not withstand scrutiny.

First, despite the alleged business slowdown, the week prior to Rivera's lay-off, the Company granted wage increases of at least $10 per week to six employees. Three days after his layoff, the Company doubled the employees' life insurance coverage and added health insurance to its benefit package. In April, the Company granted wage increases ranging from $10 to $20 to all its employees and also hired two new employees whose weekly income nearly tripled that paid to Rivera (A. 122-123).

Secondly, assuming that a business slowdown did exist, apart from his union activity, Rivera was an unlikely candidate for lay-off. Rivera, one of the Company's senior employees, began his employment as a delivery boy in 1969 and continued as such until he was promoted to a plater and washer in 1973 (A. 82-83, 152-153). Even though business had occasionally been slow during this period, Rivera was never laid off; rather, the Company assigned him delivery functions or whatever odd jobs he was capable of performing (A. 18; 86, 154). Nevertheless, on this occasion the Company departed from its prior practice of assigning other available work to Rivera and laid only him off to meet its purported economic crisis (A. 155). The Company's motive for this departure is suspect in light of the fact that at the time of Rivera's lay-off the Company retained a less senior employee as a delivery boy, work which Rivera had satisfactorily performed for three years (A. 154). In an attempt to justify this employee's retention over Rivera's, supervisor Seegull testified that the employee, Eisen, did everything to perfection *(ibid.)*. Yet, in explaining Eisen's low salary, Company owner Katz, who made the decision to lay-off Rivera, declared that Eisen "was not efficient" (A. 171).

Finally, while Rivera's job may have required little skill, Supervisor Seegull testified before the Administrative Law Judge that the plating work which Rivera performed was vital to the Company's operation (A. 155-155-A). That this was indeed the case, is demonstrated by the fact that the day after Rivera's lay-off, the Company assigned Rivera's work to Rodrigez whose salary nearly doubled Rivera's (A. 122, *infra*, p. 27).

Apparently realizing the transparency of its alleged economic justifications, the Company asserted before the Board, for the first time, that Rivera's record of absenteeism also played a part in its decision to terminate his employment. Rather than salvage its cause, this belated shift in

the Company's explanation makes it all the more clear that the real reason for Rivera's lay-off, the one which the Company has laboriously sought to conceal, was discriminatory. In sum, as the Board found, Rivera's lay-off was simply ". . . [d]esigned to rid the Company of a union supporter it could afford to lose and serve as a warning to other employees" (A. 19).

B. Rodriguez' discharge

As shown *supra*, Rodriguez and Bonilla were the two employees who initiated the Union movement at the Company and distributed union authorization cards to the Company's employees. On March 9, Rodriguez called the Company's attention to his union support by asking Foreman Seegull, whom he had observed interrogating other employees about the Union, why he did not like the Union (A. 72).

About 11:30 a.m. on March 27, Company owner Katz's son Howard phoned Foreman Seegull and asked him to tell Rodriguez that Union Agent Herman was on the telephone. When Rodriguez took the phone, Herman told him it was necessary for him to attend the Board representation hearing at the Board's office and to get the necessary permission from his boss. After the phone conversation Rodriguez told Seegull that the Union needed him at the hearing and that he was to go to the Board's office. Seegull, who was in charge of the shop at the time, did not tell him that he could not go. A few minutes later Rodriguez, under Seegull's silent gaze, punched out and left for the hearing. Rodriguez could not locate the Board's office and returned to the Company at around 2:00 or 2:30 p.m. Without ever asking for an explanation, the Company discharged Rodriguez, an employee with 14 years seniority, the next day.

The timing of the discharge – the day after Rodriguez left the plant with the Company's knowledge to assist the Union at the Board hearing – properly led the Board to conclude that the Company was motivated at least in part by Rodriguez' loyalty to the Union and his obvious importance to the Union campaign (A. 26). *N.L.R.B. v. Advanced Business Forms Corp.*, 474 F.2d 457, 464 (C.A. 2, 1973); *N.L.R.B. v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (C.A. 2, 1972). The Company's virulent opposition to the Union exhibited by its numerous other unfair labor practices strengthens the Board's conclusion. *N.L.R.B. v. Dan River Mills*, 274 F.2d 381, 384 (C.A. 5, 1960).

Before the Board, the Company contended that Rodriguez's 2-1/2 hour March 28 absence allegedly without permission was the proximate cause for his discharge. This incident, the Company claimed, was the last straw under which its years of compassionate tolerance for Rodriguez's absences finally gave way.

First, with regard to the Company's characterization of Rodriguez' absence as being without permission, it should be noted that when Rodriguez told Foreman Seegull that he had been summoned by Union represenative Herman to the Board hearing, Seegull not only did not refuse him permission to go but stood mute when Rodriguez left. Thus, Seegull appeared to consent to Rodriguez' departure, and in any case knew where he was going.[9] Hence, it is readily apparent that the Company's threshold explanation was pretextual.

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[9] According to the testimony of Company witnesses, Company owner Katz was attending the Board hearing and Company owner Perello was also absent that day. Hence, Foreman Seegull was in charge of the shop, and therefore was the appropriate person for Rodriguez to notify under the circumstances.

In the second place, the record shows that, while Rodriguez was warned in January 1973, about possible discharge if his work record did not improve, his record while not greatly improved thereafter was still better than some of the other employees, none of whom were discharged (A. 20-21; 205-206, 77-78). See, *N.L.R.B. v. Midtown Service Co.*, 425 F.2d 665, 670 (C.A. 2, 1972).

In these circumstances, the Board properly concluded that the Company discharged Union activist Rodriguez in the midst of the Union campaign because of his union activities including his attempt to assist the Union at the Board hearing.

III. THE BOARD PROPERLY DETERMINED THAT A BARGAINING ORDER IS AN APPROPRIATE REMEDY FOR THE COMPANY'S UNFAIR LABOR PRACTICES

In the instant case the Board found that the Union had been validly designated as collective bargaining representative of a clear majority of the employees in an appropriate unit, 16 out of 22. The Board further found that the Company's pre-election unfair labor practices had a "seriou effect" on the employees and dissipated the majority status which the Union enjoyed at the time of its demand for recognition. We show below that the Board properly determined that the Union had a valid card majority and that the Company's unfair labor practices were sufficiently serious to warrant a bargaining order.

A. The Union had a valid card majority

It is now settled that where an employee has signed a union authorization card which on its face states unambiguously that the signer authorize the union to represent him for collective bargaining purposes, the card

will be counted in determining whether the union represents a majority of the employees "unless it is proved that the employee was told the card was to be used solely for the purpose of obtaining an election". *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 584, 606 (1969). Here the Union's authorization cards are entitled "Application for Membership" and state on the other side of the card that "I hereby authorize and designate the [Union] through [its] representatives to negotiate and on my behalf agreements as to wages, hours, and working conditions . . . ."[10] Thus, unless the cards' plain language was "deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature" (*Gissel, supra*, 305 U.S. at 606), the cards here are valid designations.

The record fails to show that either of the two union activists who handed the employees authorization cards stated that the cards only authorized the Union to seek an election. Thus, Union activist Bonilla explained to the nine card signers he solicited starting on March 1, that the purpose of the cards was to "join a union" and that a union meant "better rights" (A. 51-52). In Bonilla's view, not much explanation was necessary because the employees "knew what [the cards] were for already" (A. 52). When Rodriguez, who solicited the remaining signatures, gave employee Petridis a card, Rodriguez explained that he wanted him to sign because Rodriguez was making "organization in the Union" and then explained the benefits unionization would bring. He did not suggest that the card would be used for the sole purpose of seeking an election (A. 67-68, 95-96).

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10 "[A]n application for membership implies authority to bargain. *N.L.R.B. v. Consolidated Machine Tool Corporation*, 163 F.2d 376, 378 (C.A. 2, 1947), cert. denied, 332 U.S. 824. See *N.L.R.B. v. Louisville Refining Co.*, 102 F.2d 678, 680 (C.A. 5, 1939), cert. denied, 308 U.S. 568. *N.L.R.B. v. Freeport Marble & Tile Co., Inc.*, 367 F.2d 371, 372 (C.A. 1, 1966). *Ace-Alkire Freight v. N.L.R.B.*, 431 F.2d 280, 283 (C.A. 8, 1970).

We further submit that contrary to the Company's contention before the Board, Union Representative Herman's remarks to various employees at a Union meeting the evening of March 5, did not serve to negate the clear meaning of the cards and the explanations given by Bonillo and Rodriguez. At that meeting, Herman explained that before a contract could be negotiated, the Union would first "go up to their employer and ask for recognition" followed, by an informal election if the Company doubted the Union's majority. If that route were unsuccessful, the Union "would file with the National Labor Relations Board for an election" (A. 105). In response to an employee question concerning the purpose of card signing, Herman testified on direct examination that he explained to the employees that a requirement to file for a Board election was to have one-third of the people in the shop sign cards but that he preferred to have around seventy-five percent to safeguard against erosion of support before an election (A. 113-114). However, he later clarified his testimony to indicate that he told the employees that a Board election was merely "one of the alternatives" for which signed cards could be used (A. 121, 115-116).[11]

The Supreme Court made it clear in *Gissel Packing Co., supra,* 395 U.S. at 607-608) that "there is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election." Accord: *Texaco v. N.L.R.B.*, 436 F.2d 520, 523-524 (C.A. 7, 1971); *N.L.R.B. v. WKRG-TV,* 470 F.2d 1302, 1318 (C.A. 5, 1973). In reaching this conclusion, the Supreme Court recognized that elections are held "in the vast majority of cases", *Gissel, supra,* 395 U.S. at 607. Indeed, in *Gissel,* the Court specifically validated authorization cards where

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[11] It appears that Herman mentioned a recognition demand followed by an informal election or a strike as the other alternatives (A. 115, 121).

each of the employees "was told one or more of the following (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board to get an election" (emphasis in original). 395 U.S. at 584 n. 5, 608. We submit that measured against this standard Herman's frank explanation of the options available to the Union to obtain recognition was not calculated to mislead the employees into believing that the sole purpose of the cards was to get an election. Therefore, in accordance with the Supreme Court's teaching in *Gissel,* the Board properly concluded that the cards should be counted.

Finally, the Board properly rejected the Company's contention that the employees did not understand the language of the cards. As shown, *supra,* 12 of the 16 card signers, including the two employees who solicited the signatures, were fluent in one or both of the two languages printed on the cards, English or Spanish. Thus, the majority of the employees in 22 employee unit unquestionably understood the meaning of the cards. With regard to the remaining four employees, the test is "whether the purpose of the cards was adequately communicated to [them], not whether they read them." *A.J. Krajewski Manufacturing Co. v. N.L.R.B.*, 413 F.2d 673, 677 (C.A. 1, 1969).

The uncontroverted testimony of Bonilla and Rodriguez is that they were able to converse with three of these employees in English (A. 52, 70). One of the Greek employees who testified that he was well aware of the purpose of these cards conveyed Rodriguez's statements to his brother-in-law, the fourth employee, who had only a limited grasp of English (A. 96). Moreover, in addition to their signatures, stipulated as genuine, each of these employees filled in the information on the card in English. For the Board not to count the cards of employees to whom the purpose of

the cards was explained "would have the effect of inhibiting organizational efforts among workers who perhaps most in need of collective economic strength." *A.J. Krajewski Mfg. Co. v. N.L.R.B., supra,* 413 F.2d at 677. Accord: *N.L.R.B. v. Gordon Mfg. Co.,* 395 F.2d 668, 669 (C.A. 6, 1968).

The only evidence offered by the Company in rebuttal was Company owner Katz's testimony that he rated the ability of these Greek and Persian employees to read, write or understand English as poor (A. 173). However, as shown above, each of the employees filled out and signed the authorization cards in English (A. 52-53, 69-70, 187, 188, 189). Moreover, the Company offered no evidence that Foreman Seegull who directed these four employees on a daily basis spoke any language other than English. In these circumstances, we submit that the Board properly counted the four challenged cards along with the twelve others.

B. The bargaining order was a proper exercise of the Board's discretion

The legal principles relevant in cases of this nature are those stated by the Supreme Court in *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575 (1969) In *Gissel,* the Supreme Court sustained the Board's remedial authority to issue a bargaining order in cases such as this one where unfair labor practices have been committed "that interfere with the election process and tend to preclude the holding of a fair election." *Id.* at 594. The Court indicated that a bargaining order would be appropriate (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that it is the only effective means of remedying those unfair labor practices, or (2) where the unfair labor practices, though less substantial, are nonetheless such that, in view their tendency to undermine the Union's majority and the likelihood of their recurrence in the future, "the Board finds that the possibility of erasing the effects of past practices and of ensuring

a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order." *Id.* at 614. It is well-settled, as this Court has noted, that "the determination of whether unfair labor practices are of such a nature as to warrant the issuance of a bargaining order is for the Board and not the Courts." *M.P.C. Restaurant Corp. v. N.L.R.B.*, 481 F.2d 75, 79 (C.A. 2, 1973). Accord: *N.L.R.B. v. Hendel Mfg. Co.*, 483 F.2d 350 (C.A. 2, 1973); *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d. 870, 872 (C.A. 2, 1970), cert. den., 402 U.S. 907. ("Appellant's attack on the use of a bargaining order must fail, moreover, in light of the Supreme Court's decision in *[Gissel]*, entrusting to the Board almost total discretion to determine when a bargaining order is appropriate").

As shown above, by March 9, the Union possessed valid authorization cards from a majority of the Company's employees. Beginning that day and continuing to within hours of the election, the Company engaged in a marked course of unlawful conduct designed to undermine the Union's majority status. Thus, the Company first coercively interrogated the employees to determine the identity of union card signers. When it discovered that a majority of the employees had signed cards, the Company unlawfully withheld wages increases from the employees promised shortly before the Union's demand for recognition. Soon afterwards the Company discriminatorily granted the wage increases to six Company supporters. Next the Company, within a ten-day period at the end of March, discriminatorily laid-off union supporter Rivera, doubled its employees life insurance, added health insurance coverage for the first time, and discharged Rodriguez, Rivera's father-in-law, and one of two leading union organizers. Two weeks before the election the Company granted across-the-board wage increases to all employees and then boasted of its higher

wages in a brochure which urged the employees to "vote Perella." The day before the election, the Company reminded the employees of their increased insurance benefits and on election day it delivered a captive audience speech threatening the employees with a loss of Christmas bonuses just hours before they were to vote.

The serious and pervasive unfair labor practices committed by the Company, which were successful in undermining the Union's support in the election already held, unmistakeably demonstrated that it was prepared to take whatever steps necessary to frustrate its employees organizational effort. In these circumstances, the Board's issuance of a bargaining order was a proper exercise of its discretion and was within the limits previously approved by this Court. As former Chairman Miller recognized, "the lingering effects of wage increases," in particular, show that "no fair election could be held at [the Company's] facility in the foreseeable future" (A. n. 1). Compare, *N.L.R.B. v. Scoler's, Inc.*, 466 F.2d 1289, 1292-1294 (C.A. 2, 1972), enforcing, 192 NLRB 248 (1971) (where, in a unit of some 18 employees, the Board concluded that the Company's coercive interrogations, threats to punish union adherents, and to reward union opponents – all directed at six of the employees – were sufficiently widespread to make a fair election impossible).

CONCLUSION

For all of the foregoing reasons, we respectfully submit that a judgment should issue enforcing the Board's order in full.

MICHAEL S. WINER,
ROBERT FULTON DASHIELL,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

February, 1975.

SUPPLEMENTAL APPENDIX

EXCERPT FROM RODRIGUEZ TESTIMONY

[159] Q. And how much were you making the last day you worked for Perrella?

A. $4 an hour.

* * * * *

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	No. 74-2385
CHARLES PERRELLA AND GERALD KATZ, CO-PARTNERS d/b/a CHARLES PERRELLA RING COMPANY,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Hugh P. Husband, Jr., Esquire
Main Street
Bridgehampton, New York 11932

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 14th day of February, 1975.